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## Contacts

### Richmond Office

Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, Virginia 23219  
(804) 788-8200  
(804) 788-8218 fax

### [Laura Ellen Jones](#)

(804) 788-8746  
ljones@hunton.com

### [Douglas E. Lamb](#)

(804) 788-8513  
dlamb@hunton.com

### Washington Office

1900 K Street NW  
Washington, DC 20006  
(202) 955-1500  
(202) 778-2201 fax

### [David S. Lowman, Jr.](#)

(202) 419-2070  
dlowman@hunton.com

### [David B. Weisblat](#)

(202) 955-1980  
dweisblat@hunton.com

### [Francine E. Friedman](#)

(202) 955-1536  
ffriedman@hunton.com

### [Timothy L. Jacobs](#)

(202) 955-1669  
(804) 788-8362  
tjacobs@hunton.com

## House Passes Bill to Extend Energy Tax Credit Provisions

On September 26, 2008, the House passed [H.R. 7060, the "Renewable Energy and Job Act of 2008,"](#) (the "Bill"), by a vote of 257-166, and a copy of the [Joint Committee on Taxation description of the Bill is available here.](#)

The Bill differs from the substitute amendment to H.R. 6049 that the Senate passed on September 23 (the "Senate Bill"). See the "[Senate Passes Bill to Extend Energy Tax Credit Provisions](#)" [Client Alert](#)," September 2008.

Despite the passage of the Bill by the House, the enactment of energy tax credit extensions remains uncertain due to key differences between the House and Senate versions of the bills, particularly that the House version is fully offset while the Senate version is only partially paid for, but includes an AMT patch and disaster tax relief that are not included in the House version. The Senate has indicated that it will not consider the House version and the bodies may find themselves in a stalemate. The White House has endorsed the Senate version and has threatened to veto the House version. See the "[Statement of Administration Policy](#)." Because Congress is likely to return next week to work on the economic recovery act, they may be able to tackle the differences in the House and Senate bills as well.

### Section 45

#### Extension

The Bill would extend the placed-in-service deadline for one year (through the end of 2009) for facilities producing electricity from wind. However, the Bill would extend the placed-in-service deadline for two years and three-quarters years (through the end of September 2011) for facilities producing electricity from closed-loop biomass, open-loop biomass, geothermal energy, municipal solid waste, and qualified hydropower. The Bill would not provide an extension for refined coal or Indian coal facilities. Finally, the Bill would eliminate the credit phase out, and in addition, the Bill contains an *investment-based limitation* on the credit amount for facilities placed in service after 2009. This limitation is substantially similar to the provision contained in a prior House bill. See the "[Ways & Means Committee Passes Extenders Bill](#)" [Client Alert](#) from May 2008.

#### Marine/Hydrokinetic

The Bill also would add marine and hydrokinetic renewable energy as a qualified resource under section 45. These provisions are very similar to those in the Senate Bill. The Bill defines marine and hydrokinetic renewable energy as energy derived from (1) waves, tides, and currents in oceans, estuaries, and tidal areas;

(2) free flowing water in rivers, lakes, and streams; (3) free flowing water in an irrigation system, canal, or other man-made channel (including projects that use non-mechanical structures to accelerate the flow of water for electric power production purposes); or (4) differentials in ocean temperature (ocean thermal energy conversion). The term excludes energy derived from any source that uses a dam, diversionary structure (except for irrigation systems, canals, and other man-made channels), or impoundment for electric power production.

A marine and hydrokinetic renewable energy facility would include any such facility placed in service after the date of enactment and before October 1, 2011, that produces electric power from marine and hydrokinetic renewable energy and that has a nameplate capacity rating of at least 150 kilowatts. The credit amount for such facilities would be one-half of the full credit amount. Note that the definition of marine and hydrokinetic renewable energy facilities subsumes small irrigation facilities and, consequently, the Bill would eliminate such facilities as a separate category.

#### **Qualified Hydropower Production**

Similar to the Senate Bill, the Bill would modify the definition of nonhydroelectric dam for purposes of qualified hydropower production by (i) requiring it to be operated for flood control, navigation, or water supply purposes and (ii) replacing the requirement that the project not enlarge the diversion structure or bypass channel, or impound additional water from the natural stream channel, with a requirement that the project be operated so that the water surface elevation at any given location and

time be the same as would occur in the absence of the project.

#### **Other Section 45 Provisions**

Also similar to the Senate Bill, the Bill would modify the definition of trash combustion facility by replacing the requirement that it burn municipal solid waste with a requirement that it be a facility (other than a landfill gas facility) that uses municipal solid waste in order to cover facilities that gasify municipal solid waste and then burn the gas to generate electricity. In addition, the Bill would allow expansions of existing open-loop and closed-loop biomass facilities to qualify for the section 45 credit to the extent of the increased amount of electricity produced at such facilities by reason of the addition of the new unit.

#### **Section 48**

Similar to the Senate Bill, the Bill would extend for eight years placed-in-service deadline (through the end of 2016) for solar energy, fuel cell, and microturbine property. The Bill would also permit the energy credit determined under section 48 to be used as a credit against the alternative minimum tax, effective for credits determined in taxable years beginning after the date of enactment. The Bill would repeal the public utility exception applicable to energy property owned by public utilities for periods after February 13, 2008, in taxable years ending after such date. Finally, the Bill would raise the \$500 per half kilowatt of capacity credit cap for fuel cell property to a \$1,500 per half kilowatt of capacity credit cap, effective as of the date of enactment.

#### **Combined Heat and Power Property**

Similar to the Senate Bill, the Bill would add a new category of energy property to section 48 for combined heat and power property ("CHP property"). CHP property is defined as property comprising a system: (A) which uses the same energy source for the simultaneous or sequential generation of electrical power, mechanical shaft power, or both, in combination with the generation of steam or other forms of useful thermal energy (including heating and cooling applications); (B) which produces (i) at least 20 percent of its total useful energy in the form of thermal energy that is not used to produce electrical or mechanical power and (ii) produces at least 20 percent of its total useful energy in the form of electrical or mechanical power (or a combination thereof); (C) has an energy efficiency percentage (as defined in the Bill) which exceeds 60 percent (with a special rule for systems using biomass); and (D) which is placed in service before January 1, 2017. CHP property would be eligible for the 10 percent energy credit under section 48, subject to various limitations based on electrical or mechanical capacity.

#### **Section 48A/48B**

The Bill would increase the section 48A credit for IGCC and other advanced coal projects from the current credit rate of 20 percent to 30 percent and permit the allocation of an additional \$950 million in credits to qualifying projects. The Bill would also increase the section 48B credit for qualifying gasification projects from the current credit rate of 20 percent to 30 percent and to permit the allocation of an additional \$150 million in credits to qualifying projects. The allocation would be effective on the

date of enactment and the increase in the credit rate would be effective for the additional allocations.

The Bill would require (a) qualifying Section 48A projects to include equipment which separates and sequesters at least 65 percent of the project's total carbon dioxide (70 percent in the case of a reallocation) and (b) qualifying Section 48B projects to include equipment which separates and sequesters at least 75 percent of total carbon dioxide emissions. The Bill would provide for recapture of the credit if a project fails to attain or maintain these required levels of sequestration. In selecting qualifying projects, the Bill would require the Secretary to

give the highest priority to projects with the greatest separation and sequestration and high priority to applicants that have a research partnership with an eligible educational institution.

Finally, the Bill would also require public disclosure of projects receiving credit allocations, including the identity of the taxpayer and the amount of the credit awarded.

#### **Clean Renewable Energy Bonds**

Notably, the Bill does not contain an extension of the Clean Renewable Energy Bond program.

#### **Other Provisions**

The Bill also contains various other provisions which would, among other things:

- Provide a five-year extension of the energy efficient commercial building deduction under section 179D.
- Provide an eight-year extension of the tax credit for residential energy efficient property under section 25D and make various modifications to the program.
- Extend and modify various tax credits available for certain liquid renewable fuels, including biodiesel, renewable diesel, and other alternative fuels.

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